

No. 13-0030 BN

Kandee Floretta's nursing license is subject to discipline because she repeatedly made errors in administering medications to patients, and in the documentation related thereto.

On January 7, 2013, the State Board of Nursing (“the Board”) filed a complaint seeking to discipline Floretta’s license as a practical nurse. On May 23, 2013, the Board filed a motion for default decision in which it stated that Floretta had been served with a copy of the complaint and the notice of complaint/notice of hearing on February 19, 2013, but had never filed an answer with this Commission. The Board acknowledged, however, that Floretta had filed what appeared to be an answer to the complaint with the Board on March 8, 2013.

By order May 29, 2013, we denied the motion for two reasons. First, the signature on the return receipt was not Floretta's, and we lacked proof that Floretta had been served in accordance

with § 621.100.¹ Second, because Floretta had evidently attempted to answer the Board's complaint, we gave her additional time to file her answer properly. She filed an answer on June 4, 2013.

We held a hearing on June 18, 2013. At the close of the hearing on that date, we left the record open for thirty days to allow Floretta to present additional evidence. We reconvened the hearing on July 31, 2013. On both dates, Ian Hauptli represented the Board and Floretta represented herself. The case became ready for our decision on October 15, 2013, the date Floretta's written argument was due.

Findings of Fact

1. Floretta is currently licensed by the Board as a practical nurse ("LPN"). Her license was current and active at all relevant times.

2. At all relevant times, Floretta worked for St. Luke's Rehabilitation Hospital ("St. Luke's").

3. On November 17, 2009, Floretta was disciplined by St. Luke's for administering the wrong medication to a patient.

4. On January 19, 2010, Floretta was disciplined by St. Luke's for not reporting a medication error after failing to administer a medication dose.

5. On July 27, 2010, Floretta was disciplined by St. Luke's for failing to administer a medication, but documenting that she had administered it.

6. On August 22, 2010, Floretta was disciplined by St. Luke's for failing to report an abnormal vital sign of a patient.

¹ Statutory references are to the RSMo Supp. 2012, unless otherwise indicated. Section 621.100 provides that service may be completed by serving the complaint upon "*such* licensee in person, or by leaving a copy of the complaint at the licensee's dwelling house or usual place of abode or last address given to the agency by the licensee with some person residing or present therein over the age of fifteen, or by certified mail."

7. On May 4, 2011, Floretta was disciplined by St. Luke's for administering medication to the wrong patient.

8. Della Abboud, the director of pharmacy at St. Luke's, performed a controlled substance audit on Floretta during April and May 2011. The purpose of the audit was to determine whether Floretta was adhering to St Luke's medication policy.

9. St. Luke's medication administration policy includes the following requirements. Waste must be witnessed and documented; a pain assessment must be performed prior to administering a controlled substance for pain; the patient's pain level must be reassessed after the administration of controlled substances for pain; some indication must be documented in the patient's record for giving other controlled substances such as anti-anxiety medications; and medications must be charted on the patient's medication administration records ("MAR").

10. The indications and justifications for administering controlled substances are to be documented several places in hospital records: in the nursing notes, in the MAR, and, if the medication is administered on a prn (as needed) basis, on a pain assessment form ("pain scale"). All these documents are kept in a patient's chart.

11. Abboud reviewed Floretta's Pyxis² records and compared them to all pertinent hospital records. She concluded that Floretta had inadequately documented the justification, administration, or wastage of controlled substances on a number of occasions.

12. From April 23, 2011 to May 20, 2011, Floretta made the following errors in documenting the withdrawal, administration, or wastage of controlled substances:

- a. Floretta removed a fentanyl patch from a patient without obtaining the signature of another nurse to witness the removal and wastage;

² Pyxis is a brand name for a controlled substance dispenser that tracks the removal of controlled substances from St. Luke's inventory.

- b. Floretta removed seven Alprazolam 0.25 mg tablets from the Pyxis at St. Luke's without documenting any justification in the patient charts;
 - c. Floretta removed 29 Norco 5/325 mg tablets with no justification or pain scale documented; four Norco tablets with no justification, pain scale, or charting; and seven with no pain reassessment charted.
 - d. Floretta removed nine Percocet 5/325 tablets with no justification and no pain scale documented and two tablets with no complaint of pain³ documented.
 - e. Floretta removed eight OxylR 5 mg tablets with no justification and no pain scale documented.
13. St. Luke's terminated Floretta's employment on June 2, 2011.

Conclusions of Law

We have jurisdiction to decide this complaint under §§ 335.066.2 and 621.045.1. The Board has the burden of proving by a preponderance of the evidence that Floretta has committed acts for which the law allows discipline. *See Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-230 (Mo. App. W.D. 2012). A preponderance of the evidence is evidence showing, as a whole, that “the fact to be proved [is] more probable than not.” *Id.* at 230 (*quoting State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000)).

The Board alleges that there is cause for discipline under § 335.066:

- 2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any certificate of registration or authority, permit or license required by sections 335.011 to 335.096 or any person who has failed to renew or has surrendered his or her certificate of registration or authority, permit or license for any one or any combination of the following causes:

³ It is unclear from the record how the documentation of a complaint of pain differs from a justification or pain scale.

* * *

(5) Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by sections 335.011 to 335.096;

* * *

(12) Violation of any professional trust or confidence [.]

Subdivision (5) – Professional Standards

The Board alleges there is cause to discipline Floretta for misconduct and incompetence. Misconduct means “the willful doing of an act with a wrongful intention[.] intentional wrongdoing.” *Missouri Bd. for Arch’ts, Prof’l Eng’rs & Land Surv’rs v. Duncan*, No. AR-84-0239 (Mo. Admin. Hearing Comm’n Nov. 15, 1985) at 125, *aff’d*, 744 S.W.2d 524 (Mo. App., E.D. 1988). Incompetency is a general lack of professional ability, or a lack of disposition to use an otherwise sufficient professional ability, to perform in an occupation. § 1.020(9); *Tendai v. Missouri State Bd. of Reg’n for the Healing Arts*, 161 S.W.3d 358, 369 (Mo. banc 2005). Incompetence is not established by isolated acts; rather, it is a “state of being.” *Albanna v. State Bd. of Reg’n for the Healing Arts*, 293 S.W.3d 423 (Mo. banc 2009).

Floretta admitted making several medication errors, but strongly denied that she had made the numerous errors found by Abboud’s audit. She repeatedly stated that records from St. Luke’s were missing, and that the circumstances of her termination were suspect. For example, she testified that another nurse named Renee Gorton had witnessed her remove and waste the fentanyl patch, and had signed the witness form, but the documentation was missing. Because of her insistence that there were records that could prove she properly documented, we allowed her thirty days after the first day of hearing to obtain and produce any additional evidence.

When we reconvened the hearing on July 31, 2013, however, Floretta produced no additional evidence. She simply repeated her previous testimony that she had properly documented medications, that St. Luke's had records that would show that she had done so, that she had asked St. Luke's to see all the records at the time of her termination, and that St. Luke's had not showed her the records. She also asked that we admit an unauthenticated copy of a letter regarding a polygraph examination administered to her. Because the Board did not object, we admitted the letter into evidence. *See Clark v. FAG Bearings Corp.*, 134 S.W.3d 730, 736 (Mo. App., S.D. 2004) (citing *Dorman v. State Bd. of Regis'n for the Healing Arts*, 62 S.W.3d 446 (Mo. App., W.D. 2001)) (where no objection is made, hearsay evidence in the records can and must be considered in administrative hearings).

In the letter, the examiner stated his opinion that Floretta answered the following questions truthfully:

Question R1: Did you take any of those controlled drugs for your personal use?

Response: No.

Question R2: Did you give any of those controlled drugs to an un-prescribed person?

Response: No.

Question R3: Did you sell any of those controlled drugs to anyone?

Response: No.^[4]

The results of polygraph examinations are inadmissible in evidence as a matter of law because of their unreliability. *Hensley v. Shelter Mutual Insurance Co.*, 210 S.W.3d 455, 469 (Mo.App. S.D., 2007). Thus, although we admitted the letter into the record, we may not consider it as evidence. We note, however, that even if we considered its results, they prove only that Floretta did not divert the medications at issue for herself or any un-prescribed person, or to

⁴ Resp. Ex. 1.

sell. The Board did not allege in its complaint that she did any of these things, only that she made mistakes in medication administration and documentation. St. Luke's director of pharmacy, Abboud, testified that she had reviewed all pertinent documentation and concluded that Floretta had made these mistakes.

We must judge the credibility of witnesses, and determine the weight and value to be accorded the evidence. *Kerwin*, 375 S.W.3d at 230. We found Abboud to be a credible witness, and Floretta was not able to rebut her testimony with any concrete evidence. We do not necessarily conclude that Floretta's testimony was intentionally false; she could just as well have been mistaken or forgetful. We do conclude, however, that she repeatedly failed to properly document the justification for withdrawal, administration, and wastage of medications.

The Board argues that Floretta "purposefully and intentionally failed to adequately document these actions, and was very sloppy in her work by failing to properly document these actions."⁵ "Purposeful and intentional" are not the same as "sloppy" – the adjectives imply different mental states. We may infer the requisite mental state from the conduct of the licensee "in light of all surrounding circumstances," *Duncan*, 744 S.W.2d at 533, but we lack evidence in this case even to infer the more culpable state of misconduct.

We do find incompetence, however. Floretta's numerous errors related to the administration and proper documentation of medications, coupled with her failure to report a patient's abnormal vital sign, spread over the course of a year and a half, are evidence that she either lacked professional ability as a nurse, or lacked the disposition to use it. Either finding supports a determination of incompetence in the performance of her nursing duties.

We find that Floretta is subject to discipline under § 335.066.2(5).

⁵ Pet. Proposed Findings of Fact, Conclusions of Law, and Argument, at 8.

Subdivision (12) – Professional Trust or Confidence

The phrase “professional trust or confidence” is not defined in Chapter 335, nor has the phrase been defined in the case law. Absent a statutory definition, the plain meaning of words used in a statute, as found in the dictionary, is typically relied on. *E&B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314, 318 (Mo. banc 2011). The dictionary definition of “professional” is

of, relating to, or characteristic of a profession or calling...[;]...
engaged in one of the learned professions or in an occupation
requiring a high level of training and proficiency...[;]
and]...characterized or conforming to the technical or ethical
standards of a profession or occupation....

WEBSTER’S THIRD NEW INT’L DICTIONARY UNABRIDGED 1811 (1986). “Trust” is

assured reliance on some person or thing [;] a confident
dependence on the character, ability, strength, or truth of someone
or something...[.]

Id. at 2456. “Confidence” is a synonym for “trust.” *Id.* at 475 and 2456. Trust “implies an assured attitude toward another which may rest on blended evidence of experience and more subjective grounds such as knowledge, affection, admiration, respect, or reverence[.]” *Id.* at 2456. Confidence “may indicate a feeling of sureness about another that is based on experience and evidence without strong effect of the subjective[.]” *Id.* Therefore, we define professional trust or confidence to mean reliance on the special knowledge and skills that professional licensure evidences. It may exist not only between the professional and her clients, but also between the professional and her employer and colleagues. *See Cooper v. Missouri Bd. of Pharmacy*, 774 S.W.2d 501, 504 (Mo App. E.D., 1989).

Floretta made many medication errors at St. Luke’s. It is obvious that proper administration of medications is an integral duty of nursing, and that patients and colleagues trust professional nurses to administer medications safely and appropriately. Failure to do so betrays that trust. There is cause to discipline Floretta under § 335.066.2(12).

Summary

There is cause to discipline Floretta's license under § 335.066.2(5) and (12).

SO ORDERED on December 3, 2013.

\s\ Karen A. Winn

KAREN A. WINN

Commissioner